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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SAVE OUR SUMMERS, et al.,

Plaintiffs,

vs.

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY,

Defendant.

NO. CS-99-269-RHW

BRIEF AMICUS CURIAE
OF THE UNITED STATES

INTEREST OF THE UNITED STATES

By Order dated December 6, 1999, this Court requested that the United States participate as amicus curiae to address (1) whether the comprehensive statutory and regulatory scheme of the Clean Air Act, 42 U.S.C. § 7401 et seq. ("CAA"), including private remedies, forecloses plaintiffs' claims under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA") and the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. ("RA"), and (2) whether

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1 the objectives and remedies of the ADA and RA can be reconciled with the CAA's
2 standards, which are the result of "compromise and consensus." Since that time,
3 the parties have been engaged in settlement discussions. Because the parties have
4 not succeeded in reaching agreement, the United States now files this brief as
5 amicus curiae.

6 The Department of Justice has authority to interpret and enforce the ADA
7 and the RA. In addition, the Environmental Protection Agency, in cooperation
8 with the individual states, has primary responsibility for the implementation and
9 enforcement of the CAA; the Department of Justice also has authority to enforce
10 the CAA. EPA has authority to set National Ambient Air Quality Standards, 42
11 U.S.C. § 7409 ("NAAQS"), and to approve state plans implementing those
12 standards. 42 U.S.C. § 7410(k). Accordingly, the United States has a strong
13 interest in addressing the interrelationship of these statutes. The United States
14 urges the Court to find that the two statutes should be read harmoniously, so that
15 this Court has jurisdiction to hear plaintiffs' ADA claims; however, the remedies
16 available under the ADA may need to be modified to avoid conflict with the CAA
17 scheme.

18 STATEMENT

19 Plaintiffs are a nonprofit organization, Save Our Summers, and two
20 children, one with serious asthma and one with cystic fibrosis. The children state
21 that they suffer serious health problems from the effects of seasonal wheat stubble
22 burning in the vicinity of their homes. The smoke that results from burning
23 assertedly renders them unable to avail themselves of various public facilities,
24 including schools and roads. Instead, they must either remain at home or leave the
25 region altogether.

1 Wheat stubble burning is a method that farmers in eastern Washington State
2 use to clear their fields. Some farmers choose to use this method because it
3 effectively removes stubble and vegetation, while also eliminating pests (thus
4 reducing the need to use pesticides). Burning is fairly widespread in the area, and
5 is performed by hundreds of farmers each season. The burning produces large
6 quantities of smoke.

7 The State of Washington has imposed a permitting program on crop
8 burning. Under this program, farmers must apply in advance for a permit to burn
9 crop stubble. The State will determine whether burning is “reasonably necessary
10 to carry out the enterprise;” “[a] farmer can show it is reasonably necessary when
11 it meets the criteria of the best management practices and no practical alternative
12 is reasonably available.” Wash. Admin. Code § 173-430-040. If the State or its
13 delegates conclude that these conditions are met, it will grant a permit. A permit
14 also “must be conditioned to minimize air pollution” and may be denied “during
15 periods of adverse meteorological conditions.” *Id.* See also Plaintiffs’
16 Memorandum of Authorities Supporting Motion for Reconsideration, Exh. C
17 (specimen of permit).

18 Plaintiffs brought suit against the Washington State Department of Ecology
19 under the ADA and the RA, seeking a preliminary injunction against the issuance
20 of further crop burning permits. This Court denied the injunction, tentatively
21 concluding that it lacked jurisdiction to consider the suit. After plaintiffs moved
22 for reconsideration, this Court issued an order providing the United States an
23 opportunity to file a brief as amicus curiae.

STATUTORY AND REGULATORY BACKGROUND

A. The Americans with Disabilities Act and the Rehabilitation Act

Title II of the ADA generally prohibits discrimination on the basis of disability by public entities. The nondiscrimination provision states that:

... no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Section 504 of the Rehabilitation Act contains a similar prohibition that states:

[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance

29 U.S.C. § 794(a).

Title II has broader applicability than Section 504, as it applies to all State activities and Section 504 applies only to programs or activities that receive Federal financial assistance. See 42 U.S.C. § 12131(1)(B); 29 U.S.C. 794(a); Pennsylvania Department of Corrections v. Yeskey, 118 S. Ct. 1952, 1954 (1998) (title II covers State prisons); Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997), cert. denied, 524 U.S.937 (1998) (finding that title II encompasses “all facets” of state government). The broad coverage of title II is supported by the ADA’s legislative history. H.R. Rep. No. 485(II), 101st Cong., 2d Sess., at 84 (1990) (“[t]he Committee has chosen not to list all the types of actions that are included within the term ‘discrimination,’ as was done in titles I and III, because this title essentially simply extends the anti-discrimination prohibition embodied in section 504 to all actions of state and local governments.”).¹

¹ Section 504 now defines a covered “program or activity” to include “all of

1 Title II requires public entities to make reasonable modifications to their
2 usual policies, practices, and procedures where necessary to avoid discrimination
3 on the basis of disability. See 42 U.S.C. § 12131(2)(defining “qualified individual
4 with a disability” as “an individual with a disability who, with or without
5 reasonable modifications to rules, policies, or practices . . . meets the essential
6 eligibility requirements for the receipt of services or the participation in programs
7 or activities provided by a public entity”); 28 C.F.R. § 35.130(b)(7) (1999)
8 (requiring reasonable modifications when necessary to avoid discrimination).²
9 Reasonable modifications in policies, practices, or procedures are required in
10 order to avoid discrimination, “unless the public entity can demonstrate that
11 making the modifications would fundamentally alter the nature of the service,
12 program, or activity.” *Id.* The Supreme Court has suggested that analysis of a

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14 the operations of” a department, agency, or other instrumentality of a State or local
15 government receiving Federal financial assistance. 29 U.S.C. § 794(b).

16 ² The Attorney General was assigned the duty to issue regulations
17 implementing title II. 42 U.S.C. 12134(a). With limited exceptions not relevant
18 herein, Congress specified that those regulations were to be consistent with titles I
19 and III of the ADA and with the coordination regulations issued under section
20 504. 42 U.S.C. § 12134(b). The Supreme Court recently noted that “[b]ecause the
21 Department [of Justice] is the agency directed by Congress to issue regulations
22 implementing Title II, . . . its views warrant respect. . . . [T]he well-reasoned
23 views of the agencies implementing a statute constitute a body of experience and
24 informed judgment to which courts and litigants may properly resort for
25 guidance.” *Olmstead v. L.C.*, 527 U.S. 581, 597-598 (1999) (internal quotations
26 and citations omitted).

1 defense of fundamental alteration would include consideration of “undue
 2 hardship” elements such as the costs of the modification, the budget of the
 3 program or activity, and the overall size and type of the program. See Olmstead v.
 4 L.C., 527 U.S. 581, 606 n.16 (1999). This reasonableness standard also applies to
 5 the section 504 claim. Alexander v. Choate, 469 U.S. 287, 300, n. 20 (1985).³

6 **B. The Clean Air Act**

7 **1. General Framework**

8 The provisions of the CAA that are most relevant to this case are those
 9 relating to the establishment and attainment of the NAAQS.⁴ Under the NAAQS
 10 scheme, “the States and the Federal Government [are] partners in the struggle
 11 against air pollution.” General Motors Corp. v. United States, 496 U.S. 530, 532
 12 (1990). See also Commonwealth of Virginia v. EPA, 108 F.3d 1397, 1406-09
 13 (D.C. Cir. 1997). EPA first sets the national ambient air quality standards for
 14 specific pollutants at levels necessary to protect public health and welfare. Then
 15 States have the primary responsibility for selecting and implementing the pollution

16
 17 ³ Given this similarity of standards, and for ease of discussion, subsequent
 18 text that discusses the nondiscrimination statutes in greater detail generally will
 19 focus only on the text and analysis of the ADA.

20 ⁴ The CAA has several other major components, addressing, inter alia,
 21 pollution from new stationery sources, 42 U.S.C. § 7411, hazardous air pollutants,
 22 42 U.S.C. § 7412, mobile sources, 42 U.S.C §§ 7521-7590, acid rain deposition,
 23 42 U.S.C. §§ 7651-7661, and stratospheric ozone protection, 42 U.S.C. § 7671.
 24 The operation of these provisions differs significantly from that of the NAAQS,
 25 and the discussion in this brief is not necessarily applicable to those statutory
 26 provisions.
 27

1 control measures necessary to attain the NAAQS within their boundaries; they do
2 so by establishing State Implementation Plans (“SIPs”). Only if a State fails
3 regarding its obligations with respect to these SIPs can EPA promulgate a Federal
4 plan for the area in question. 42 U.S.C. § 7410(c).

5 Sections 108 and 109 of the CAA, 42 U.S.C. §§ 7408, 7409, authorize EPA
6 to establish, review and revise NAAQS. After an extensive review of the
7 scientific literature, EPA is to promulgate “primary” and “secondary” NAAQS to
8 protect against “adverse” health and welfare effects for specific pollutants.

9 § 7409(a)(1), (b), (d). “Primary” standards are set at levels which protect public
10 health with “an adequate margin of safety.” EPA must review the scientific
11 literature with respect to NAAQS for a pollutant at least once every five years,
12 and make any revisions and promulgate any new standards that may be
13 appropriate. § 7409(d)(1).⁵

14 Once a NAAQS is set, each State has primary responsibility to ensure that
15 areas within its borders attain the NAAQS. Within 3 years of promulgation of a
16 new or revised NAAQS, EPA must designate areas as meeting (“attainment”) or
17 not meeting (“nonattainment”) such standards. § 7407(d)(1)(B). For each
18 nonattainment area, the State is to submit to EPA SIPs that contain control
19 measures necessary to reduce air pollution so that the area will attain the NAAQS.
20 States generally have 3 years from designation to submit such plans to EPA for
21 approval. § 7502(b). The plans are to provide for attainment “as expeditiously as
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24 ⁵ “Secondary” standards are “requisite to protect the public welfare from any
25 known or anticipated adverse effects.” 42 U.S.C. § 7409(b)(2). For each criteria
26 pollutant, the primary and secondary standards are identical.
27

practicable, but no later than 5 years from the date . . . of designation.”

§ 7502(a)(2).⁶

EPA’s discretion is limited in the approval process. See Union Electric Co. v. EPA, 427 U.S. 246, 269 (1976) (“Congress plainly left with the States . . . the power to determine which sources would be burdened by regulation and to what extent”); Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 79 (1975) (EPA has “no authority to question the wisdom of a State’s choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2)”). Once EPA approves a SIP, it becomes enforceable Federal law. § 7413(a). Moreover, when a previously designated nonattainment area has monitoring data demonstrating that it is attaining the NAAQS, the area may be redesignated “attainment.” To qualify for redesignation, the State must agree to continue to implement its SIP, submit a plan for maintaining the NAAQS, and meet several other requirements.

In the present case, the pollutant of concern appears to be particulate matter (“PM”). EPA has two different sets of ambient standards for PM -- one set of standards for PM₁₀ (particles 10 microns and smaller) and one set of standards for PM_{2.5} (particles 2.5 microns and smaller). Some areas in the State of Washington, including certain areas in which crop burning occurs, have been designated nonattainment for PM₁₀. 56 Fed. Reg. 56,694 (Nov. 6, 1991). In 1993, EPA approved (in part) a SIP submitted by the State of Washington which

⁶ EPA has authority to grant limited extensions under certain circumstances; also, the Act provides different deadlines for certain standards not relevant here.

1 included provisions relating to PM10 emissions from outdoor burning. 58 Fed
2 Reg. 4578 (Jan. 15, 1993); WAC 173-425 (1990).

3 The United States is in the initial stages of controlling PM2.5. EPA set a
4 separate standard for PM2.5 for the first time in July 1997.⁷ Pursuant to the
5 Transportation Equity Act for the 21st Century ("TEA-21"), Pub. L. No. 105-178,
6 112 Stat. 463 (codified at 42 U.S.C. § 7407 note), and to a Presidential
7 Memorandum issued when the PM2.5 standards were set, 62 Fed. Reg. 38,421
8 (July 18, 1997), areas will not be designated as attainment or nonattainment until
9 2003 to 2005,⁸ which means that state plans to attain the PM-2.5 standard would
10 not be required until 2006 to 2008. State plans will have to demonstrate that they
11 are attaining the PM-2.5 NAAQS as expeditiously as practicable. Under the CAA,

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13 ⁷ The July 1997 standard for PM2.5 was challenged in court. The Court of
14 Appeals for the District of Columbia Circuit remanded, but did not vacate, the
15 standard based on constitutional concerns. The government sought, and the
16 Supreme Court granted, certiorari. American Trucking Ass'n, Inc. v. EPA, 175
17 F.3d 1027 (D.C. Cir. 1999), rehearing granted in part and denied in part, 195 F.3d
18 4, cert. granted Browner v. American Trucking Ass'n Inc., 120 S.Ct. 2003
19 (May 22, 2000) and American Trucking Ass'n. v. Browner, 120 S.Ct. 2193 (May
20 30, 2000).

21 ⁸ TEA-21 required the EPA to ensure that the PM-2.5 monitoring network
22 was established by December 31, 1999. § 6102(b). It then required that governors
23 submit recommended designations 1 year after receipt of 3 years of monitoring
24 data, and provided that EPA was to make the designation for a state by
25 December 31, 2005 or 2 years from a governor's receipt of the monitoring data,
26 whichever date was earlier. § 6102(c).

1 the attainment dates could not be set later than 2013 to 2015 (unless further
2 extensions are granted).

3 2. Federal Activities Addressing Crop Stubble Burning

4 Although EPA does not directly regulate agricultural burning under the
5 CAA, the federal government is involved in helping States decide whether and
6 how they will regulate burning to attain and maintain the PM NAAQS. Under the
7 CAA, for certain PM10 nonattainment areas, States may as a practical matter need
8 to include in their SIPs control measures for agricultural operations that contribute
9 to ambient concentrations of PM10. EPA is in the process of preparing guidance
10 about what control measures would be acceptable. In preparing that guidance,
11 EPA intends to take into account recommendations from the Department of
12 Agriculture's ("USDA's") Agricultural Air Quality Task Force. This body, which
13 includes industry representatives and other experts in the fields of agriculture and
14 air quality, was established as a result of legislation, enacted in 1996, in which
15 Congress required USDA to establish an advisory body "to address agricultural air
16 quality issues." 7 U.S.C. § 5405(d)(1). The legislation also included a
17 Congressional finding that "recommendations that may be issued by any Federal
18 agency to address air pollution problems related to agriculture or any other
19 industrial activity should be based on sound scientific findings that are subject to
20 adequate peer review and should take into account economic feasibility." 7 U.S.C.
21 § 5405(a)(4). The Agricultural Air Quality Task Force has sent to USDA
22 recommendations regarding a policy on agricultural burning, which USDA has
23 recently forwarded to EPA. After reviewing these recommendations, EPA intends
24 to develop proposed guidance and solicit public comment on it before issuing final
25 guidance to the States.

SUMMARY OF ARGUMENT

Plaintiffs' ADA and RA claims are not barred by the CAA, notwithstanding the CAA's extensive remedial scheme.⁹ These two statutory schemes can be interpreted in a manner that promotes both statutes' objectives; thus, neither scheme should be construed to displace the other.

The principles set forth in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981), are not controlling here. First, 42 U.S.C. § 1983 is distinguishable from the ADA. Section 1983 provides a vehicle to seek compliance with the standards set forth in a given statute, but the ADA provides rights and remedies that are distinct from other federal statutes. Second, the Supreme Court itself has significantly limited the application of Sea Clammers in the context of section 1983 actions.

While plaintiffs' claims may not be barred, the Court should take into account the statutory scheme of the federal Clean Air Act, as well as the State's own Clean Air Act, in determining what remedial relief is available under the ADA. The ADA and the RA require reasonable modifications, but do not require modifications that would constitute a fundamental alteration of an existing program. See Olmstead v. L.C., 527 U.S. 581, 603-607 (1999); Alexander v. Choate, 469 U.S. 287, 300, n. 20 (1985). In assessing what constitutes a "fundamental alternation," a court must examine the program in issue, including its policies and objectives. Because the CAA sets forth the Federal framework for air pollution control, in assessing what constitutes a fundamental alteration, the

⁹ Except where stated otherwise, Plaintiffs' ADA and RA claims will be referred to collectively as the "ADA claims."

1 court must consider the CAA's policies and objectives as well as the State's clean
2 air and agricultural burning laws.

3 Three elements of the Federal scheme are especially relevant to this
4 analysis. The CAA establishes nationwide standards for air quality; it provides for
5 State discretion in achieving the goals of the Act; and it generally provides States
6 with substantial amounts of time in which to comply with the requirements of the
7 Act. The Court should consider these three elements of the statutory scheme in
8 determining whether particular remedies are reasonable modifications or
9 fundamental alterations. The Court should also consider the policies and purposes
10 of the State Clean Air Act. That Act seeks to permit crop burning where there is
11 no practicable alternative, while minimizing adverse health effects.

12 ANALYSIS

13 A. This Court Has Jurisdiction to Consider Plaintiffs' Americans 14 With Disabilities Act and Rehabilitation Act Claims

15 The question whether this Court has jurisdiction to consider plaintiffs' ADA
16 claims turns on ordinary principles of statutory interpretation. Under those
17 principles, one remedy created by Congress is not lightly construed to displace
18 another. "[W]hen two statutes are capable of co-existence, it is the duty of the
19 courts, absent a clearly expressed congressional intention to the contrary, to regard
20 each as effective." Morton v. Mancari, 417 U.S. 535, 551 (1974).

21 In some instances, it is not possible to give effect to one statute without
22 thwarting the intent of Congress in enacting another. When this occurs, the court
23 must determine which of the statutes Congress intended should be applicable. The
24 latter task only becomes necessary, however, if there is no way of harmonizing the
25 two statutes. "[T]o the extent that statutes can be harmonized, they should be."

26 United States v. Trident Seafoods Corp., 92 F.3d 855, 862 (9th Cir. 1996); see also
27 2A Sutherland Statutory Construction § 51.05 (4th ed. 1984) ("Where one statute

1 deals with a subject in general terms, and another deals with a part of the same
2 subject in a more detailed way, the two should be harmonized if possible; but if
3 there is any conflict, the latter will prevail, regardless of whether it was passed
4 prior to the general statute, unless it appears that the legislature intended to make
5 the general act controlling.”). The Court’s first task is thus to harmonize the two
6 statutes; the feasibility of harmonizing them will often turn on the particular
7 circumstances in which the case arises.

8 This Court previously concluded that it did not have jurisdiction to hear
9 plaintiffs’ claims under the ADA and the RA, in light of the comprehensive nature
10 of the federal scheme for the regulation of air quality. It appears based on the
11 facts of this case that Congress’s purposes in enacting the CAA can be adequately
12 taken into account in selecting a remedy under the ADA, as explained in more
13 detail in part B, infra. Thus, the Court need not have determined whether, had
14 there been a true conflict between the statutory schemes on the facts of this case,
15 the ADA or CAA scheme would have yielded. Because the two statutes can be
16 successfully harmonized, according to ordinary principles of statutory construction
17 there is no occasion to inquire which statute Congress intended should be
18 controlling.¹⁰

20 ¹⁰ Section 12201(b) of the ADA also suggests that Congress generally
21 intended that the ADA coexist with remedies, rights and procedures under other
22 statutory schemes. See Watkins v. J & S Oil Co., 977 F. Supp. 520, 524 n.2
23 (D. Me. 1997) (in discussing the relationship between the Family Medical Leave
24 Act and the ADA, citing section 12201(b), and stating that a disabled employee is
25 “simultaneously protected” by the two statutes); Wood v. County of Alameda, 875
26 F. Supp. 659, 664 (N.D. Cal. 1995) (finding that this provision “is intended to
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This case is not governed by the analysis applied by the Supreme Court in Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 19-21 (1981). In Sea Clammers, the Court considered whether plaintiffs could bring a claim under 42 U.S.C. § 1983 to recover damages for a violation of the Clean Water Act ("CWA"). Plaintiffs sought to enforce, pursuant to section 1983, the standards set forth in the CWA even though the CWA had its own statutory enforcement mechanisms. The Court found that relief pursuant to section 1983 was not available because Congress had already created a "sufficiently comprehensive" remedial scheme under the CWA, and to allow claims under section 1983 would circumvent Congress's decision to allow only certain remedies and not others when implementing the CWA. Id. at 20.

The Supreme Court's analysis in Sea Clammers applies only to cases involving actions brought under section 1983, and should not be applied to claims under the ADA or the RA. Section 1983 provides a vehicle for plaintiffs to assert violations of federal law; it does not create a substantive right that exists independent of the statute in issue. In contrast, the ADA and the RA (and certain other disability discrimination statutes) provide protections against discrimination on the basis of disability that are governed by specific substantive standards and are independent of other federal protections.

The Court's analytical approach in Sea Clammers did not inquire into whether section 1983 and the CWA's statutory scheme could be reconciled. Instead, the Court focused its inquiry on the CWA's statutory scheme, and, finding

ensure that plaintiffs can avail themselves of *both* the applicable rights and remedies under the ADA *and* complimentary state rights and remedies") (italics in original).

1 that scheme to be comprehensive, concluded that Congress intended to foreclose
2 reliance on section 1983 to enforce the CWA. That analytical approach has not
3 been applied outside of the section 1983 context because section 1983 is unusual
4 in providing an enforcement mechanism for substantive rights defined in another
5 statute, so that in cases involving that provision there are not two distinct statutory
6 schemes to be reconciled. Here, by contrast, the ADA and RA themselves define
7 both substantive rights distinct from those contained in the CAA, and provide
8 means of enforcing those rights. In cases like this one, involving potential
9 conflicts between two distinct statutory schemes, the Sea Clammers analysis does
10 not apply; instead, a court should seek to reconcile the two schemes, as explained
11 above.

12 Indeed, the Court has concluded in only one instance besides Sea Clammers
13 that a statute's remedial scheme is so comprehensive as to bar plaintiffs' claims
14 alleging violations of the statute pursuant to section 1983. See Blessing v.
15 Freestone, 520 U.S. 329, 346-347 (1997) (noting this fact in rejecting assertion
16 that section 1983 provides no avenue for relief for claims challenging Social
17 Security Act); Smith v. Robinson, 468 U.S. 992, 1012-1013 (1984) (finding that
18 comprehensive remedial scheme of Education for Handicapped Act precluded
19 section 1983 claim to enforce the same educational rights). Even when the Sea
20 Clammers test is applicable, the Court has said that a "difficult showing" is
21 required to demonstrate that Congress intended to divest plaintiffs of the ability to
22 proceed under section 1983. See Blessing, 520 U.S. at 346.

23 **B. Identification Of Remedies Under the Americans with Disabilities Act**
24 **Must Take Into Account the Purposes and Policies of the Federal And**
25 **State Clean Air Acts**

26 The ADA requires a State or local government to make reasonable
27 modifications to its programs for qualified individuals with disabilities, but not to
28

1 fundamentally alter its programs. See 42 U.S.C. § 12132, 28 C.F.R.
 2 § 35.130(b)(7). As we discuss in more detail below, by adhering to this principle,
 3 a court may reconcile any tension or conflict between the Federal Clean Air Act,
 4 the State of Washington's Clean Air Act, and the ADA's statutory schemes in its
 5 assessment of what, if any, modifications to the State's wheat stubble burning
 6 permit scheme are required. Because of the posture of this case and the limited
 7 record before the Court, the United States will not address the appropriateness of
 8 any particular proposed remedies or modifications.

9 1. The ADA's Reasonable Modification/Fundamental Alteration Standard

10 The ADA requires only "reasonable" modifications, and does not require a
 11 "fundamental alteration" in a state program. See Olmstead 527 U.S. at 603-607
 12 (stating and applying the "fundamental alteration" standard). A proposed
 13 modification is not required if it results in a fundamental alteration of a program or
 14 imposes an undue burden or hardship on the defendant. See Easley v. Snider, 36
 15 F.3d 297, 305 (3d Cir. 1994); see also Olmstead, 527 U.S. at 603-606 & n.16; 28
 16 C.F.R. § 35.130(b)(7).¹¹ The burden of showing that a particular modification

18 ¹¹ Courts examine whether a proposed modification imposes a fundamental
 19 alteration to a program or an undue hardship on a defendant based on essentially
 20 the same factors. What constitutes an undue hardship requires a "case-by-case
 21 analysis." Olmstead, 527 U.S. at 606 n.16; see 42 U.S.C. § 12134(b) (Title II
 22 ADA regulations shall be consistent with regulations implementing the RA);
 23 Helen L.v. DiDario, 46 F.3d 325, 338 (3d Cir. 1995) (rejecting assertions that
 24 providing in-home attendant care services would cause a fundamental alteration or
 25 undue burden since such services were consistent with the State's own program
 26 objectives).

1 amounts to a “fundamental alteration” rests with the defendant. See ibid.; see also
2 Johnson v. Gambrinus Co., 116 F.3d 1052, 1059 (5th Cir. 1997).

3 “The determination of what constitutes reasonable modification is highly
4 fact-specific, requiring case-by-case inquiry.” Crowder v. Kitagawa, 81 F.3d
5 1480, 1486 (9th Cir. 1996); see Martin v. PGA Tour, Inc., 204 F.3d 994, 999 (9th
6 Cir. 2000) (applying reasonableness standard of Title III of the ADA); Staron v.
7 McDonald’s Corp., 51 F.3d. 353, 356 (2d Cir. 1995); Easley, 36 F.3d at 305.

8 Therefore, it ordinarily is inappropriate to make an abstract determination that
9 certain types of modifications either would be reasonable or would amount to
10 fundamental alterations. Instead, a court must analyze and closely consider the
11 facts of the case at hand, and assess whether a modification for the plaintiff, as
12 opposed to individuals generally, is reasonable or constitutes a fundamental
13 alteration of the program. See Martin, 204 F.3d at 1001 (“evidence must focus[]
14 on the specifics of the plaintiff’s or defendant’s circumstances and not on the
15 general nature of the accommodation”; quoting Johnson, 116 F.3d at 1060).

16 Assessing the reasonableness of a proposed modification may include
17 considering whether it is effective and whether it is difficult, as a practical matter,
18 to implement. See Martin, 204 F.3d at 999. Moreover, if a plaintiff seeks a
19 modification to a statutory or regulatory scheme, the reasonable
20 modification/fundamental alteration inquiry should examine the underlying
21 purposes of the program, rules, and regulations at issue. See e.g., Easley, 36 F.3d
22 at 303-305. By examining a program’s or regulation’s primary purposes and
23 objectives, a court can determine whether these goals would be undermined if the
24 modification were granted. See Martin, 204 F.3d at 1000 (allowing plaintiff the
25 use of a golf cart was not a fundamental alteration of the nature of the golf
26 competition since walking, and asserted fatigue resulting from walking, were not
27

1 deemed significant elements of competition); compare Easley, 36 F.3d at 305-306
2 (providing in-home attendant care services to non-alert physically disabled
3 persons would alter essential purposes of the program, which is designed to
4 increase opportunities for independent living, including employment), and
5 Helen L. v. DiDario, 46 F.3d 325, 337-339 (3d Cir. 1995) (in-home attendant care
6 services for physically disabled person currently served in nursing home and
7 segregated from the community would be consistent with, and not fundamentally
8 alter, the objectives of state attendant care program).

9 Thus, the fundamental alteration component of the reasonable modification
10 analysis is not measured in the abstract. Instead, when dealing with activities of a
11 public entity, the context of the regulatory scheme provides a critical backdrop,
12 and the regulatory body's ability to pursue and achieve the purposes underlying
13 the program or statutory scheme in question must be examined in light of the
14 proposed modification. Thus, a court must examine whether the proposed
15 modification is consistent with the objectives of the entire program in determining
16 whether a modification is reasonable or a fundamental alteration. See Easley, 36
17 F.3d at 305 (weighing extent to which the proposed modification would shift the
18 focus of the program); Heather K. v. City of Mallard, Iowa, 946 F. Supp. 1373,
19 1389 (N.D. Iowa 1996) (denying summary judgment; requiring assessment of
20 whether a proposed modification to ordinance on backyard burning is reasonable,
21 or fundamentally alters the objectives of the ordinance or imposes an undue
22 hardship on the defendant).¹²

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24
25 ¹² In Heather K., 946 F. Supp. at 1384-1385, the district court cited a letter
26 from the Department of Justice that addressed a different set of facts; that letter is
27 not applicable in this case.

2. The Federal and State Clean Air Programs

The Court should consider the purposes and structure of the Federal and State clean air regulatory schemes in conducting its reasonable modification/fundamental alternation analysis. By following this approach, a court may reconcile any tension or conflict between the Federal Clean Air Act, the State of Washington's Clean Air Act, and the ADA's statutory schemes in its assessment of what, if any, modifications to the State's wheat stubble burning program are required.

a. The Purposes and Structure of the Federal Clean Air Program

The Federal clean air program as embodied in the CAA is particularly important to the Court's analysis, in light of the Court's obligation to harmonize Federal statutes. United States v. Trident Seafoods, Corp., 92 F.3d 855, 862 (9th Cir. 1996). In establishing the national air pollution regulatory scheme, Congress carefully balanced a number of factors; the Court should attend carefully to this balancing in selecting a remedy under the ADA. We identify three especially important features of the Federal scheme that the Court should consider in analyzing possible modifications to the State program. These are: (1) the CAA's creation of distinctively national standards for air quality, the NAAQS, which protect sensitive populations, but not the most sensitive individual within a population; (2) the CAA's delegation to the States of discretion to select the means by which to achieve these standards; and (3) the timetables provided under the Act for State compliance with the NAAQS, which give States a substantial amount of time to attain the NAAQS, rather than requiring immediate compliance. In order to ensure that the ADA and CAA are interpreted harmoniously, the Court should consider each of these three features, and their role in the Washington State agricultural burning permit program, as part of its reasonable modification/

1 fundamental alteration analysis. Because of the posture of this case and the
2 limited record before the court, however, the United States will not address the
3 appropriateness of any particular proposed remedies or modifications in light of
4 this framework.

5 i. The Act's National Standards. Section 109(b)(1) of the Clean Air Act
6 requires that EPA set the NAAQS at levels that are "requisite to protect public
7 health" with an "adequate margin of safety." 42 U.S.C. § 7409(b)(1). In setting
8 the NAAQS, Congress intended that EPA consider the effects of air pollution on
9 sensitive populations, such as asthmatics. See Lead Industries Ass'n, Inc. v. EPA,
10 647 F.2d 1130, 1153 (D. C. Cir. 1980) ("[S]ensitive persons, such as asthmatics
11 . . . are [to be] included within the group that must be protected."); see also
12 American Lung Association v. Browner, 134 F.3d 388, 389 (D.C. Cir. 1998) ("In
13 its effort to reduce air pollution, Congress defined public health broadly. NAAQS
14 must protect not only average healthy individuals, but also 'sensitive citizens' –
15 children, for example, or people with asthma, emphysema, or other conditions
16 rendering them particularly vulnerable to air pollution.") (quoting S. Rep. No. 91-
17 1196, at 10 (1970)). However, Congress stated that EPA need not consider the
18 effects of air pollution on the most sensitive individuals within those populations.
19 See S. Rep. No. 91-1196, at 10 (EPA must consider the effects to a "representative
20 sample of persons comprising the sensitive group rather than to a single person in
21 such a group"), reprinted in 1 Staff of the Senate Comm. On Public Works, 93d
22 Cong., 2d Sess., *"A Legislative History of the Clean Air Act Amendments of 1970"*
23
24
25
26
27

1 at 410. (Comm. Print 1974). EPA has promulgated NAAQS for particulate
2 matter, which appears to be the pollutant at issue in this case. See 62 Fed. Reg.
3 38,652 (1997) (establishing NAAQS for PM₁₀ and PM_{2.5}).¹³

4 EPA's standards thus establish the appropriate national level of "public
5 health" protection for sensitive subpopulations with regard to these pollutants,
6 recognizing the possibility that some sensitive individuals may continue to
7 experience ill effects as a result of exposure to particulate matter. These standards
8 were set by EPA pursuant to Congressionally delegated authority, and reflect basic
9 scientific and societal choices that are properly reserved to Congress and to EPA.
10 EPA has approved the State of Washington's SIP as consistent with achieving the
11 PM-10 NAAQS.¹⁴

12 To the extent that this Court considers, or the plaintiffs seek, remedies that
13 would require the State to achieve air quality standards more protective than those
14 of the NAAQS, the fact that EPA has established the existing NAAQS levels is

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16 ¹³ As already noted, the Court of Appeals for the D.C. Circuit has remanded,
17 but not vacated, the PM-2.5 standards. See supra note 7. Although the same court
18 vacated EPA's revised PM-10 standard, American Trucking, 175 F.3d 1027, 1057,
19 EPA had decided to revoke the preexisting PM-10 standard (codified at 40 C.F.R.
20 50.6) only on an area-by-area basis. See 62 Fed. Reg. 38,652, 38,701 (July 18,
21 1997). At the time the standard was vacated, EPA has only done so for one area
22 (Boise, Idaho). Accordingly, the previous PM-10 standard, promulgated in 1987,
23 remains effective in all other areas of the United States.

24
25 ¹⁴ In 1993, EPA approved a SIP submitted by the State of Washington
26 which included provisions relating to PM₁₀ emissions from agricultural burning.
27 58 Fed Reg. 4578 (Jan. 15, 1993); WAC 173-425 (1990).

1 relevant to the analysis of whether those remedies constitute reasonable
2 modifications or fundamental alterations.¹⁵ To the extent that remedies amount to
3 setting new standards for ambient air quality that are more stringent than the
4 federal NAAQS, they might well be in tension with the CAA framework
5 established by Congress, or the standards set by EPA pursuant to Congressionally
6 delegated authority. The degree of tension would depend on, among other factors,
7 the geographical reach of the remedy. Remedies that are site specific, localized and
8 otherwise narrowly tailored to the circumstances of the plaintiffs would likely not
9 raise concerns about the NAAQS. Without commenting on possible remedies
10 specific to this case, those might include such actions as temporal or other
11 limitations on permitted burning in specific areas, provision of prior notice of
12 burning to affected individuals, and other actions that do not conflict with broad
13 federal ambient air quality standards. On the other end of the spectrum, however, a
14 remedy that effectively established a new ambient air quality standard statewide
15 would for example be a fundamental alteration and therefore would be precluded.¹⁶

16 ii. State Discretion. Second, as we have explained, the Clean Air Act makes
17 the states and federal government regulatory “partners in the struggle against air
18

19 ¹⁵ Under the CAA, 42 U.S.C. § 7416, States may, however, set more
20 stringent ambient air quality standards than Federal requirements. See infra n. 17.

21 ¹⁶ The present case involves the claims of only two individuals; it is
22 unclear to what extent other such claims might be asserted in the future. The
23 United States believes that it would be important, however, to monitor the
24 aggregate effect of remedies that might be awarded in such cases, and that
25 remedies that could be reasonable standing alone might be fundamental alterations
26 when considered in the aggregate.
27

1 pollution.” General Motors Corp., 496 U.S. at 532. With respect to the NAAQS,
2 EPA’s role is generally to set national air quality standards and to ensure that these
3 standards are observed. But “Congress plainly left with the States . . . the power to
4 determine which sources would be burdened by regulation and to what extent.”
5 Union Electric, 427 U.S. at 269. EPA has “no authority to question the wisdom of
6 a State’s choices of emission limitations if they are part of a plan which satisfies
7 the standards of § 110(a)(2).” Train, 421 U.S. at 79.

8 Accordingly, states are given considerable discretion to choose the
9 appropriate mix of control strategies for reaching attainment under the CAA.
10 States may choose varying levels of controls for specific industries or emitting
11 sectors, depending upon the costs of control, the importance of those emitting
12 sectors to the State, and other factors that a State may deem appropriate in
13 determining who should bear the greatest burden of pollution control and how and
14 when they should do so. This discretion is a vital element in the Federal/State
15 balance established by the Act. The extent to which a remedy significantly disturbs
16 that balance is relevant to assessing whether that remedy is a fundamental
17 alteration or a reasonable modification. For example, a remedy that effectively
18 required a given industry sector to shut down statewide would substantially alter
19 the scope of the state’s discretion in this regard, and would constitute a
20 fundamental alteration.¹⁷

21
22 ¹⁷ Notably, under the CAA, 42 U.S.C. § 7416, States may elect to set more
23 stringent air quality standards than Federal requirements. Therefore a State might
24 choose on its own to adopt a more stringent ambient air quality standard or to
25 heavily regulate a particular emitting sector, and even to do so in response to the
26 types of concerns raised by plaintiff in this case. Because the Act seeks to provide
27

1 iii. Time For Compliance. Finally, Congress has established a detailed
2 schedule for State and Federal efforts to attain the NAAQS. After EPA
3 promulgates a new or revised NAAQS, the statute provides three years for EPA to
4 identify attainment and nonattainment areas. 42 U.S.C. § 7407(d)(1)(B). States
5 then have three years in which to submit SIPs for nonattainment areas, CAA
6 § 7502(b), which are to provide for attainment "as expeditiously as practicable"
7 and which EPA can set as late as 10 years after the date of designation (and which
8 EPA can then extend by up to two years). § 7502(a)(2). As discussed above, in
9 1998, Congress lengthened the timetable further for PM_{2.5}. When States have
10 been unable to meet certain attainment dates for a particular pollutant, Congress
11 has provided even more time for States to achieve the NAAQS.¹⁸

12 Thus, in addition to setting an overall level of protection "requisite to protect
13 public health" the overall framework of the CAA sets forth a comprehensive
14 timetable for implementation and ultimate attainment of the air quality standards
15 set forth in the NAAQS. This scheme provides the States with sufficient time to
16 obtain and install appropriate air quality monitoring equipment, generate necessary
17 monitoring data, and then develop, adopt, and implement appropriate plans for
18 attainment. It also provides time for development of new control equipment and
19 technological innovations, and time for sources to install new controls or otherwise
20 change their methods of operation.

21 _____
22 States with discretion to regulate air quality within their boundaries, however,
23 remedies that would *require* such measures must be tested against the reasonable
24 modification/fundamental alteration standard.

25 ¹⁸ Congress extended the attainment date for ozone for a large number of
26 areas in the 1990 Amendments. CAA § 181.
27

1 Congress thus intended that States have sufficient time to investigate and
2 implement methods of controlling air pollution that bring the State into attainment
3 while limiting the resulting burden on regulated entities. Accordingly, the fact that
4 a remedy requires a State to implement changes rapidly should be considered as
5 part of the reasonable modification analysis, particularly if that remedy also
6 involves significant adjustments to the State program. Moreover, remedies that
7 have the effect of altering specific timetables established pursuant to the CAA
8 would warrant close attention in the reasonable modification analysis. For
9 example, a remedy that required immediate attainment of a recently promulgated
10 NAAQS would likely constitute a fundamental alteration. If a remedy were
11 localized, site-specific, and carefully tailored for the affected individuals, it would
12 be more likely that it could require prompt compliance without raising these timing
13 concerns.

14 b. The Purposes and Structure of the State Clean Air Program

15 This brief focuses on the task of harmonizing the ADA and CAA schemes;
16 the United States has particular expertise with these schemes. In assessing the
17 State's reasonable accommodation obligation, however, the Court should also
18 consider the purposes and policies underlying the State's clean air program.
19 Although the purposes and policies of the State program have not yet been
20 developed fully by the parties, we provide a preliminary overview in the margin.¹⁹

21
22 ¹⁹ The wheat stubble burning program that the plaintiffs contest was
23 developed and implemented by the State of Washington under the authority of the
24 State Clean Air Act. The underlying purposes of that Act include:

25 ... to secure and maintain levels of air quality that protect human
26 health and safety, including the most sensitive members of the
27 population, to comply with the requirements of the federal clean air

1 A more complete analysis will be required when the Court considers particular
2 remedies.

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4
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6 act, to prevent injury to plant, animal life, and property, to foster the
7 comfort and convenience of Washington's inhabitants, to promote the
8 economic and social development of the state, and to facilitate the
9 enjoyment of the natural attractions of the state.

10 Wash.Rev.Code § 70.94.011 (1998). It also states that "[i]t is the policy of the
11 state that the costs of protecting the air resource and operating state and local air
12 pollution control programs shall be shared as equitably as possible among all
13 sources whose emissions cause air pollution." Id.

14 As implemented by regulation, the State's agricultural burning permit
15 program seeks to "establish[] controls for agricultural burning in the state in order
16 to minimize adverse health and the environment effects from agricultural burning"
17 and to develop "economically feasible alternative methods to agricultural
18 burning." Wash. Admin. Code § 173-430-010 (1999). The permit program
19 regulations further provide that "[a]gricultural burning is allowed when it is
20 reasonably necessary to carry out the enterprise. A farmer can show it is
21 reasonably necessary when it meets the criteria of the best management practices
22 and no practical alternative is reasonably available." Wash. Admin. Code § 173-
23 430-040. "Best management practices" are those practices for reducing air
24 contaminant emissions from agricultural activities as identified by a research task
25 force established by the State's Department of Ecology. Wash.Rev.Code.
26 §§ 70.94.650(4).
27

3. The United States Takes No Position At This Time As To The Application of the Reasonable Modification Analysis To The Facts Of This Case

“The determination of what constitutes reasonable modification is highly fact-specific, requiring case-by-case inquiry.” Crowder v. Kitagawa, 81 F.3d 1480, 1486 (9th Cir. 1996). Given the early posture of the record, the scant evidence on possible modifications does not render feasible a fair and complete analysis at this point. The United States accordingly takes no position on the appropriateness of any proposed modifications. The United States may seek an opportunity to comment on any reasonable modifications suggested by the parties.

CONCLUSION

The district court has jurisdiction to consider plaintiffs' ADA and RA claims. In determining an appropriate remedy, however, the Court should take into account the key features of the applicable statutory schemes in order to ensure that any remedy does not constitute a fundamental modification of those schemes.

DATED this 6th day of September 2000.

Respectfully submitted,

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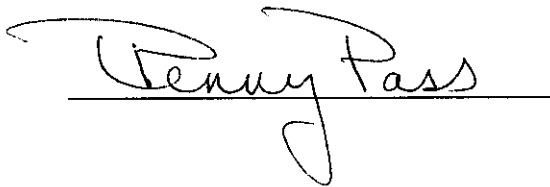
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1 I hereby declare under penalty of perjury, pursuant to 28 U.S.C. §1746, that
2 on this 6th day of September, 2000, I served a copy of **BRIEF AMICUS**
3 **CURIAE OF THE UNITED STATES** upon counsel, by placing said copy in a
4 prepaid envelope addressed to the persons hereinafter named at the places and
5 addresses below stated, which are the last known addresses, as she is informed and
6 believes, and by placing said envelopes and contents in the outgoing mail of the
7 Office of the United States Attorney for the Eastern District of Washington so the
8 same is deposited in the United States mail at Spokane, Washington, to:

9 Leslie Seffern
10 Assistant Attorney General
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12 P.O. Box 40117
13 Olympia, WA 98504-0117

14 Karen S. Lindholdt
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A handwritten signature in cursive script, reading "Penny Pass", is written over a horizontal line. The signature is located to the right of the two addresses listed.